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27 May 1996

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street
Washington, D.C. 20054

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Re: In the Matter of Implementation of Cable Act Reform Provisions
of the Telecommunications Act of 1996, CS Docket No. 96-85

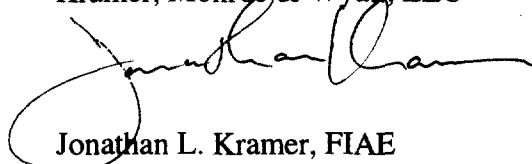
Dear Mr. Caton:

Please find enclosed an original and 16 copies of "Comments Regarding Changes to 47 CFR 76.605 Note 6 And Request for Clarification" filed as part of the Commission's proceeding in CS Docket No. 96-85.

Any questions regarding this submission should be referred to the undersigned.

Sincerely,

Kramer, Monroe & Wyatt, LLC


Jonathan L. Kramer, FIAE
Principal Technologist

Enclosure

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**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554**

In the Matter of) CS Docket No. 96-85
)
Implementation of) COMMENTS REGARDING
Cable Act Reform Provisions) CHANGES TO 47 CFR 76.605 NOTE 6
of the Telecommunications) AND REQUEST FOR
Act of 1996) CLAIRIFICATION

Submitted by:

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COMMENTATORS

1. Jonathan L. Kramer,¹ and Mitchell K. Wyatt, Esq., on behalf of Kramer, Monroe & Wyatt, LLC (hereinafter, "KMW"), a firm who's principals have and currently represent over two hundred Local Franchise Authorities (hereinafter, "LFAs") throughout the United States, respectfully submits the following comments.

QUESTION PRESENTED

2. Whether an LFA retains jurisdiction to enforce the technical standards imposed by 47 C.F.R §76, Subpart K in light of the changes to the Cable Communications Policy Act of 1984 §624(e) and Commission's rules at 47 C.F.R §76.605 Note 6?

¹ Mr. Kramer has been jointly retained by the Federal Communications Commission and the Department of Justice as their cable television engineering and technology expert witness in "Playboy Entertainment Group, Inc. and Graff Pay-Per-View Inc. v. United States of America, United States Department of Justice, Janet Reno, Attorney General, and the Federal Communications Commission" (US District Court, District of Delaware, Civil Action Number 96-94/96-107-JJF Consolidated Actions). Mr. Kramer believes that his participation in this case as the Commission's cable television technology expert does not impact these proceedings, and vice versa.

Mr. Kramer was the LFA's Co-Chair of the Joint Task Force on Technical Standards which, on October 17, 1991, submitted joint recommendations with the cable industry (represented by the National Cable Television Association) to the Commission regarding the technical regulation of the cable industry. See FCC 92-61, Adopted February 13, 1992.

BACKGROUND

3. Recent changes to §624(e) of the Communications Act of 1934 and 47 C.F.R. by Congress prompting the Commission to change §76.605 Note 6 has inadvertently signaled significant elements of the cable television industry that the Commission no longer intends that LFAs should have any role in enforcing the Commission's technical standards rules.² For example, Tele-Communications, Inc. (hereinafter, "TCI"), the nation's largest cable operator, has already proffered the assertion to certain LFAs that the Commission (and only the Commission) has jurisdiction to inspect for compliance with the Commission's technical standards.³ We ask that the Commission now re-affirm its long-standing policy encouraging LFAs to enforce the Commission's technical standards found in 47 C.F.R §76, Subpart K.

4. In adopting the Telecommunications Act of 1996, Congress struck the prior-existing language at §624(e) of the Communications Act of 1934⁴ which provided, in part, that:

"A franchising authority may require as part of a franchise (including a modification, renewal, or transfer thereof) provisions for the enforcement of the standards prescribed under this subsection. A franchising authority may apply to the Commission for a waiver to impose standards that are more stringent than the standards prescribed by the Commission under this subsection."

In lieu thereof, Congress inserted the following language:

"No State or franchising authority may prohibit, condition, or restrict a cable system's use of any type of subscriber equipment or any transmission technology."

²47 CFR 76 Subpart K

³ In a letter dated May 10, 1996 to Hon. Richard Snyder, Mayor of New Martinsville, West Virginia, TCI's attorney, Mr. T. Randolph Cox said, "TCI contends that the right of a local franchising authority to hear complaints on technical standards, or to require any testing related to proof of performance have been preempted by the 1996 amendments." This comment was tendered in part in reply to a franchise Notice of Violation and Demand to Cure where the City alleges that TCI grossly failed to properly perform a FCC-required proof-of-performance test on its system within New Martinsville, and the City ordered TCI to re-perform a proof-of-performance test on its system upon 30 days notice. That period having expired without action by TCI, the City ordered that the re-proof of the system be performed within 10 days thereafter. In all, that city granted TCI well over 40 days to perform the retest, fully complying with 47 CFR §76.601(d) Note.

⁴ 47 USC 544(e)

5. In response to Congress' action, the Commission in this proceeding on April 5, 1996 struck "the language in Note Six of Section 76.605 of our rules, which states that '[a] franchising authority may apply to the Commission for a waiver to impose cable technical standards that are more stringent than the standards prescribed by the Commission.' We replace that language with the new language in Section 301(e) of the 1996 Act."⁵ The Commission now seeks comments on the impact of the change to §624(e) and its rules.

**THE TELECOMMUNICATIONS ACT OF 1996 SECTION 301(E) CHANGE TO
THE COMMUNICATIONS ACT SECTION 624(E) IS UNRELATED TO LFA
ENFORCEMENT OF 47 C.F.R. §76, SUBPART K, TECHNICAL STANDARDS**

Restrictions On LFAs Contained In The Communications Act Section 624(e) Affects Only "Subscriber Equipment" And "Transmission Technology"

6. Cable Communications Policy Act of 1984 §624(e), as amended by Section 301(e) of the Telecommunications Act of 1996 now reads,

"Within one year after the date of enactment of the Cable Television Consumer Protection and Competition Act of 1992, the Commission shall prescribe regulations which establish minimum technical standards relating to cable systems' technical operation and signal quality. The Commission shall update such standards periodically to reflect improvements in technology. No State or franchising authority may prohibit, condition, or restrict a cable system's use of any type of subscriber equipment or any transmission technology."⁶

The plain meaning of the first sentence in above language was accomplished by the promulgation of 47 C.F.R. §76, Subpart K. The second sentence reflects congressional intent that the Commission would change the minimum technical standards for cable systems over time, and as technological advances occurred.

⁵ CS Docket 96-85 Order And Notice Of Proposed Rulemaking Adopted: April 5, 1996 @ ¶103

⁶ Cable Communications Policy Act of 1984 §624(e)

“Subscriber equipment” means converter boxes, remote controls and like equipment.

7. Regarding the third and final sentence, the Cable Communications Policy Act of 1984 §623(b)(3), provides insight into the definition of “subscriber equipment” in the following language,

“The regulations prescribed by the Commission under this subsection shall include standards to establish, on the basis of actual cost, the price or rate for (A) installation and lease of the *equipment used by subscribers* to receive the basic service tier, including a *converter box and a remote control unit and, if requested by the subscriber, such addressable converter box or other equipment as is required to access programming ...*” [Emphasis added.]

“Transmission technology” relates to broad categories of methods of delivering services, such as PCS, MMDS, DBS, OVC, etc..

8. While a definition of “transmission technology” is not found in the current law, other definitions provide insight into the meaning of “transmission technology”.

The term “advanced telecommunications capability” is defined, *without regard to any transmission media or technology*, as high-speed, switched, broadband telecommunications capability that enables users to originate and receive high-quality voice, data, graphics and video telecommunications using any technology.⁷

9. From this definition one can clearly determine that “transmission technology” is not high-speed, switched, broadband telecommunications capability that enables users to originate and receive high-quality voice, data, graphics, and video telecommunications using any technology. Congress also made findings and policy decisions that give meaning to the term “transmission technology”. Transmission technology is not related to a specific hardware or type of infrastructure, but appears to mean a broad category of methodologies for delivering high-quality voice, data, graphics, and video telecommunications (such as PCS, MMDS, DBS, OVS, etc.). Support for this proposition is found in

⁷ Telecommunications Act of 1996 §706(c)(1)

Congress's finding of fact related to other technologies in the preamble of the 1996 Telecommunications Act.⁸

10. This interpretation of §624(e) is consistent with Congress's intent to promote competition, remove barriers to entry while ensuring the LFAs right to continue to enforce (but not regulate) technical standards. Surely Congress would agree that requiring a telephone company to use cable transmission technology to deliver programming services would unfairly burden and could represent a barrier to entry by telephone companies in the provision of multi-channel video programming services. Also, §624(e), as presently constructed, would also prohibit an LFA from requiring a cable operator to use "cable transmission technology" as opposed to "wireless transmission technology" or "satellite transmission technology" to provide programming to subscribers. If and when other transmission technologies become feasible, easier to deploy, or more cost effective in the delivery of programming services to subscribers, the cable operators will not want to be constrained to use "cable transmission technology".

11. From the simplest and most plain meaning of the third and final sentence of §624(e), interpreted in the context of existing definitions and congressional findings, one can logically conclude that Congress's intent by the change in §624(e) was two-fold. First, it was to prohibit LFAs from dictating to cable operators which type of converter box, remote control or other subscriber equipment that must be used by a cable operator. Second, regarding "transmission technology", the change prohibits LFAs from forcing existing suppliers and potential market entrants to adopt and use any specific cable, wireless, satellite, or other transmission technologies to transmit their services to consumers.

⁸ Telecommunications Act of 1996 §2 "(5) The cable industry has become vertically integrated; cable operators and cable programmers often have common ownership. As a result, cable operators have the incentive and ability to favor their affiliated programmers. This could make it more difficult for noncable-affiliated programmers to secure carriage on cable systems. **Vertically integrated program suppliers also have the incentive and ability to favor their affiliated cable operators over nonaffiliated cable operators and programming distributors using other technologies.**" (Emphasis added)

Cable Communications Policy Act of 1984 §624(e), as amended by the Telecommunications Act of 1996 does not specifically prohibit enforcement of 47 C.F.R §76, Subpart K by LFA's.

12. Section 624(e) is silent on the issue of enforcement of technical standards by LFAs, and therefore, as previously discussed, the changes to §624(e) do not affect technical standards imposed on cable operators *nor on their enforcement by LFAs*. The changes to §624(e) are limited to subscriber equipment and transmission technology. Section 624(e) does not, in the plain meaning of its words, address the issue of technical standards enforcement. Therefore any argument that the changes to §624(e) by Congress purport to restrict enforcement of technical standards by LFAs is not founded in fact or a rational construction of the section itself.

47 C.F.R §76, SUBPART K, SETS THE MINIMUM TECHNICAL STANDARDS WITH WHICH ALL CABLE SYSTEMS MUST COMPLY.

13. The following language from the Commission's rules remains unchanged after the enactment of 1996 Telecommunications Act: "The operator of each cable television system shall be responsible for insuring that each such system is designed, installed, and operated in a manner that fully complies with the provisions of this subpart [Subpart K, Technical Standards]...."⁹ Neither Section 301(e) of the Telecommunications Act of 1996, nor the Commission's CS Docket 96-85, Order and Notice of Proposed Rulemaking, adopted on April 5, 1996, altered the technical requirements for operation of a cable system. Therefore it remains resolved that Cable Operators must continue to comply with all of the requirements set forth in 47 C.F.R §76 Subpart K.

Undesirable results will occur if LFAs do not have the authority to enforce the technical standards of 47 C.F.R §76, Subpart K.

14. We do not believe that the Commission intended the result of its limited action in changing 47 C.F.R §76.605 Note 6 to be the wholesale elimination of local supervision and enforcement of technical standards compliance as is professed by TCI. On its face, the change in the language of Note 6 is limited in its scope and clear in its limited

intent. The preemption of States and LFAs from prohibiting, conditioning, or restricting a cable system's use of any type of subscriber equipment or transmission technology language does not equate to the wholesale elimination of local supervision and enforcement of technical standards compliance. No clear preemption exists or was intended by Congress that would, in any way, restrict a State or LFA from *enforcing* the rules adopted by the Commission. Subscriber equipment and transmission technology simply does not equate to technical standards, as some or many cable operators may argue.¹⁰

15. Mere enforcement of the existing technical rules adopted by the Commission does not constitute any prohibition, conditioning, or restriction of a cable system's use of any type of subscriber equipment or any transmission technology. Should a cable operator make such a claim, it should do so in an appeal of a State or LFA's action before the Commission.

16. Further, a result of local oversight in the enforcement process, many LFAs have been able to effectively assess their incumbent cable operators demonstrated abilities (or inability) regarding the quality of the operator's service, including signal quality, during the course of a renewal under Section 626 of the Cable Act. The Commission correctly points out "that the 1996 Act did not amend the franchising or the renewal provisions of the Communications Act."¹¹ Any limitation now to a LFAs enforcement of the Commission's rules would have the additional undesirable side-effect of chilling a LFAs ability to make such a renewal determination as required by §626.

The Commission's Changes To 47 C.F.R §76.605 Note 6 Do Not Alter An LFA's Authority To Enforce The Technical Standards Imposed By 47 C.F.R §76, Subpart K.

17. Deletion of Note 6 as it existed prior to April 5, 1996 merely removed an LFA's ability to pursue the imposition of more stringent technical standards than those set by the Commission in 47 C.F.R §76, Subpart K. Arguably, the change in §624(e) of the Communications Act may be viewed as Congressional intent to remove a perception held by some cable operators that LFA's act as a barrier to entry on to the information highway

⁹ 47 C.F.R §76.601(a)

¹⁰ See Footnote 3

¹¹ CS Docket 96-85 Order And Notice Of Proposed Rulemaking @ ¶104

by establishing the FCC as the ultimate arbiter of technical standards. Congress could have, but did not, restrict an LFA's enforcement authority under 47 C.F.R §76, Subpart K.

18. The first deleted sentence in §624(e) reads as follows, "A franchising authority may require as part of a franchise (including a modification, renewal, or transfer thereof) provisions for the enforcement of the standards prescribed in under this section." This verbiage is clearly permissive, and simply removing the language creates the ambiguity at issue in this request for comments.¹²

LFA's presently enforce 47 C.F.R §76, Subpart K, Technical Standards

19. Presently, and unaltered by the 1996 Telecommunications Act, the Commission already recognizes LFA's as the first-line enforcer of its technical standards. The Commission's rules at 47 C.F.R §76.607 (Resolution of Complaints) states in part:

"... Note: Prior to being referred to the Commission, complaints from subscribers about the quality of the television signal delivered must be referred to the local franchising authority and the cable system operator." Additionally, "...Each system operator shall be prepared to show, on request by an authorized representative of the Commission **or the local franchiser**, that the [cable] system does, in fact, comply with the rules [47 C.F.R §76]."¹³ [Emphasis added.]

From this language it is clear that the Commission intended for an LFA to enforce technical standards of 47 C.F.R §76; if the Commission did not intend for LFA's to ensure compliance with Commission rules, technical standards included, then LFA's would not have been given authority the inspect for compliance with Commission rules [technical standards]. Further, there is no useful purpose of referring subscriber complaints to the local franchising authority unless the LFA had the authority to act and enforce cable system technical standards.

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¹² One could argue by negative implication that removal of the permissive verbiage that LFAs are no longer able to locally adopt enforcement provisions. On the other hand, an equally likely argument can be made that Congress could have easily indicated that a "...franchising authority may not require..." and by failing to so indicate, truly meant to preserve franchise authorities right to locally adopt enforcement provisions.

¹³ 47 C.F.R §76.601(a)

The Commission relies on LFAs to enforce the technical standards of 47 C.F.R §76, Subpart K.

20. It is useful to revisit the Commission's own comments underscoring value and point of this dualism in enforcement:

“Given the nature of our ‘deliberately structured dualism’ in the regulation of cable television . . . we recognize that both this Commission, as well as local franchising authorities, will and should have roles in enforcing the technical standards we adopt today. We continue to believe . . . that the local franchising authorities are the proper initial locus of any complaint about the quality of technical service provided by a cable operator. Local Authorities are most familiar with the local system operation and plant, as well as any local factors which could affect the resolution of a problem. We note, that we have in the past referred complaints concerning service quality to local authorities for resolution, and this practice resulted in the disposition of the vast majority of such complaints.”¹⁴

It is clear that the Commission does not intend to be, nor does it have the day-to-day resources to be the first, and only, point of contact in resolving the many thousands of technical quality complaints which are now filed with LFAs annually. Rather, the current process of referring service quality complaints to LFAs is not only proper, but the only manageable process to secure timely resolution of such complaints.

21. We are personally aware of the proven value of this partnership in enforcement through our experience as technology advisors to hundreds of communities around the country. Typically, and consistent with the Commission's view that LFAs are in the best position to detect and resolve technical problems with local systems, KMW's principals are called upon by LFAs to evaluate a local cable system's compliance with the Commission's technical rules. We often find violations of the Commissions rules which, in some cases, point to a systemic technical problem impacting the entire cable system. In other cases, the violations are limited to smaller portions of the cable system. In some cases, we do not violations. Having performed over thirty thousand test point examinations and Proof-of-Performance reviews for LFAs over the past 12 years, often as the result of a body of complaints having been filed with the LFA, we have seen and participated in the “dualism of enforcement” which the Commission described. We have also

¹⁴ See *In the Matter of Cable Television Technical and Operational Requirements—Review of the Technical and Operations Requirements of Part 76, Cable Television*, Report and Order in MM Docket No. 91-169, 7 FCC Rcd 2021 @ ¶81

seen local cable operators resolve to eliminate rules' violations and comply with the Commission's rules, and to demonstrate compliance with those rules, as a result of an LFA-initiated investigations. Consistently, the consequence of this local process has been the delivery of better picture quality for local cable subscribers *without the need for appeal to or intervention by the Commission.*

22. We believe that a very undesirable impact has already begun to be felt by some LFAs in a manner which is contrary to the intent of the Section, and certainly contradicts the proven value of the Commission's " 'deliberately structured dualism' in the regulation of cable television."¹⁵ Moreover, the impact already felt by some LFAs suggests that the cable industry intends to extricate itself from efficient local oversight in favor of what it must hope will be limited oversight directly by the Commission (due to restricted staff and other resources available at the Commission).

CONCLUSION

23. Therefore, based on the above facts, we conclude that an LFA does, in fact, retain jurisdiction to enforce the technical standards imposed by 47 C.F.R §76, Subpart K without regard to the changes to the Cable Communications Policy Act of 1984 §624(e) and the Commission's rules at 47 C.F.R §76.605 Note 6.

24. We strongly urge the Commission to reaffirm in this proceeding the existing and proven value of LFA-enforcement of technical standards set forth in 47 C.F.R §76, Subpart K and the efficacy of the Commission's own principle of "dualism in enforcement". Such a reaffirmation would be completely consistent with Congress' intent, the Commission's long-standing policy, as well as properly recognizing an LFAs ability to collect and act upon technical service complaints generated at the local level, retaining the Commission as the proper body to consider appeals of local actions only. Moreover, such a reaffirmation would not require the Commission to make any further change to 47 CFR 76.605 Note 6.

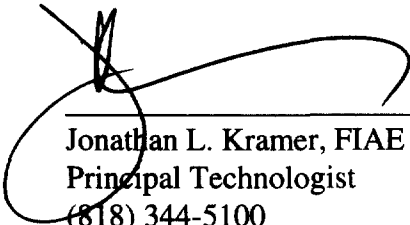
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¹⁵ See Cable Television Report and Order, 36 FCC 2d @ 207

Respectfully Submitted,

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